IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO. 34 OF 2003.

1. Shri Sureshchandra Dattu Sinai
Nadkarni.

2. Smt. Sharad Sureshchandra Nadkarni,
both residents of H. No. 284,
Regina Mundi High School Road,
Behind Salgaonkar Medical
Research Centre, Chicalim, Goa. .... Petitioners.

Versus

1. Dr. (Mrs.) Dattu Sinai Nadkarni,
alias Smt. Nalini Nihar Nag.

2. Shri Kalidas Dattu Sinai Nadkarni,
both residents of F-1, 1st Floor,
Chamunda Apartments, Opp. Post
Office, Curchorem, Goa. .... Respondents.

Shri M.S. Usgaonkar, Senior Advocate with Shri Sudin M.S. Usgaonkar, Advocate for the Petitioners.

Shri V.B. Nadkarni, Senior Advocate with Shri J. Cardozo, Advocate for the Respondents.

CORAM: A. P. LAVANDE, J.

DATE OF RESERVING THE JUDGMENT: 17.03.2006
DATE OF PRONOUNCING THE JUDGMENT : 24.03.2006

J U D G M E N T:

The petitioners who are defendants in Special Civil Suit No. 5/2003/A pending in the Court of the Civil Judge, Senior Division at

Quepem, by the present revision application assail the Order dated 11th September, 2003 passed by the Civil Judge S.D., Quepem dismissing the application dated 28.4.03 filed by the petitioners under Order 7 Rule 11 of C.P.C. The parties shall hereinafter be referred to as they appear in the cause title of the suit.

2. The plaintiffs filed the above suit against the defendants for partition of certain properties by metes and bounds, for separate possession and for recovery of a sum of Rs. 10,00,000/- with interest thereon. In the plaint the plaintiffs averred that the plaintiff and defendant No.1 are the sons of the late Dattu Mablu Sinai Nadkarni and defendant No.2 is the wife of defendant No.1. It has been further stated that deceased Dattu Nadkarni was the owner of four properties mentioned in the plaint ('the suit properties'). It has been further stated that the defendant No.1 started managing the suit properties after the death of the father of the plaintiff and appropriating its income without sharing anything with the plaintiffs. Upon the defendants being served, an application purporting to be under Order 7, Rule 11 of C.P.C. was filed on the ground that since the suit was mainly for partition of the suit properties and since the plaintiffs had not relied upon any Inventory proceedings or on any public deed determining the shares of the parties, the plaint was liable to be rejected since it did not disclose any cause of action. The same was contested by the plaintiffs and

after hearing both sides, the trial Court by the impugned order dismissed the application. The trial Court held that the shares of all the parties are fully established and therefore the plaint was not liable to be rejected. Reliance was placed by the defendants upon the Judgment of this Court in the case of ***Cruz Fernandes and his wife v. Smt. Gregorina Estefania Sofia Fernandes and others*** reported in 1991 (4) Bombay C.R. 400.

3. Mr. Usgaonkar, learned Senior Counsel appearing on behalf of the appellants/defendants at the outset submitted that the plaint was liable to be rejected under Order 7, Rule 11(a) since it did not disclose any cause of action. He submitted that the ratio of the Judgment of this Court in in **Cruz Fernandes (Supra)** is squarely applicable in the present case. Relying upon the provisions of the Portuguese Civil Code, more particularly, Articles 2158, 2082, 2085 to 2217, 1412, 1415 and 1419, the learned Senior Counsel submitted that the plaintiffs in the absence of any Inventory proceedings or any public deed having been drawn, were not entitled to 1/3 share in the suit properties, but they were entitled to 1/3 share in the estate. Therefore, the learned Senior Counsel submitted that the plaint as filed did not disclose any cause of action. He further submitted that in order to seek partition, the parties must have pre-existing right to the property and in the present case the plaint does not disclose any right to the suit properties in favour of the Plaintiffs.

The learned Senior Counsel further submitted that on a proper reading of the plaint, it is evident that the same does not disclose any cause of action. Therefore the plaint is liable to be rejected and the impugned order deserves to be quashed and set aside. In support of his submissions, the learned Senior Counsel relied upon the following Judgments :-

(1)Shri Cruz Fernandes and his wife v. Smt. Gregorina Estefania Sofia Fernandes and others (1991 (4) BCR 400;

(2)Hiraji Tolaji Bagwan (since deceased by L.Rs.) v. Shakuntala reported in A.I.R. 1990 S.C. 619;

(3) T. Arivandandam v. T.V. Satyapal and another reported in (1977) 4 SCC 467; and

(4) ***I.T.C. Limited v. Debts Recovery Appellate Tribunal and others reported in (1998) 2 SCC 70.***

4. The learned Senior Counsel also placed reliance on the Judgment of the Supreme Court of Lisbon dated 26th June, 1951 which has been published in Boletim do Ministerio Justica.

5. Per contra, Mr. Nadkarni, learned Senior Counsel appearing on

behalf of the respondents, submitted that Order 7, Rule 11(a) of C.P.C. is not attracted in the present case. He further submitted that the defendants have not even averred in their application that the plaintiffs are governed by the law of Inventory proceedings which are applicable to only those persons who have domicile in Goa and therefore the entire argument advanced on the basis of the applicability of the provisions of the Portuguese Civil Code dealing with Inventory proceedings is of no avail to the petitioners inasmuch as the same is an issue which has to be decided after the parties lead evidence in the suit. He further submitted that having regard to the pleadings in the plaint, the plaint cannot be summarily rejected. On merits, he submitted that it cannot be said that the right of the plaintiffs to the suit properties has not been crystallized on the death of Dattu Nadkarni and therefore it cannot be said that there is no cause of action. The learned Senior Counsel further submitted that there is a distinction between non-disclosure of cause of action by the plaintiffs and the plaintiffs having no cause of action for filing the suit. In support of his submissions, the learned Senior Counsel relied upon the following Judgments:-

(1)Marcus Nunes alias Marcos Nunes and others v. Mrs. Filomena Sebastiana da Piedade Fernandes and another reported in 2000 (2) Goa L.T. 539;

(2) State of Orissa v. Klockner and Company and others reported in A.I.R. 1996 S.C. 2140;

(3) M.V. 'Sea Success I' v. Liverpool and London Steamship Protection and Indemnity Association Ltd. and another reported in A.I.R. 2002 Bombay 151; and

(4) M/s Crescent Petroleum Ltd. v. m.v. "MONCHEGORSK' and another reported in A.I.R. 2000 Bombay 161.

6. I have considered the submissions made by the learned Senior Counsel for the parties. I have also gone through the authorities relied upon by the learned counsel for the parties. Under Order 7 Rule 11 the plaint has to be rejected if it does not disclose cause of action. No doubt in order to find out whether a plaint discloses cause of action, the plaint has to be considered in its totality. In the present case the suit has been filed claiming partition, separate possession and for recovery of money on the ground that the plaintiffs and the defendants are the heirs of late Dattu Mablu Sinai Nadkarni who owned the suit properties. Neither in the plaint nor in the application filed under Order 7, Rule 17 by the defendants, there is an averment stating that the plaintiffs are governed by the provisions of Portuguese Civil Code in relation to the Inventory proceedings. That being the position, I find considerable merit in the submission of Mr. Nadkarni that in the absence of any averment in this

regard, it would not be proper exercise of jurisdiction to invoke Order 7, Rule 11(a) of C.P.C. and to hold that there is no cause of action for filing the suit. Mr. Nadkarni is right in his submission that this is an issue which requires to be decided only after permitting the parties to lead evidence and no finding on this issue can be given at this stage only on the basis of an application filed under Order 7, Rule 11 of C.P.C. That being the position, in my opinion, no case has been made out by the petitioners to set aside the impugned order rejecting the application filed by the plaintiffs. No doubt the finding recorded by the trial Court in the impugned order that the ratio of the Judgment of this Court in the case of **Cruz Fernandes** (supra) is not applicable since the shares of the parties are fully established and determined cannot be sustained inasmuch as nowhere in the plaint the plaintiffs have stated that the shares of all the parties have been established and determined. But the mere fact that the trial Court has recorded such a finding will not be a ground to set aside the impugned order in view of the finding given above as to the applicability of the provisions of the Portuguese Civil Code in relation to the Inventory proceedings in the present case. That being the position, it is not necessary for me to deal with the other submissions made on behalf of the petitioners on the assumption that the parties are governed by the provisions of the Portuguese Civil Code dealing with Inventory proceedings.

7. In view of the above, I do not find any merit in this revision application. Consequently the same is dismissed with costs which are quantified at Rs.1500/-.

A. P. LAVANDE, J.

sl.